GOVERNMENT OF MALAYSIA & ANOR.

v.

TAIB ABD. RAHMAN

SUPREME COURT, KUALA LUMPUR
ABDUL HAMID OMAR LP
MOHD. AZMI SCJ
GUNN CHIT TUAN SCJ
[SC CIVIL APPEAL NO. 01-59 OF 1990]
6 APRIL 1991

STATUTORY INTERPRETATION: *Death of party to proceedings - Administration or probate not yet granted - Who can apply to be a party - Meaning of "that" immediately preceding "other person" - Relative or conjunctive verb - Discretion of Court - Subordinate Court Rules 1980, O. 8 r. 7(2) - Probate and Administration Act 1959, s. 39.*

CIVIL PROCEDURE: *Plaintiff deceased - Administration or probate not granted - Son applied to be appointed party to the proceedings - Consent order - Setting aside - Capacity to make application - Whether barred - Waiver - Fresh action - All matters effectually determined - Probate and Administration Act 1959, s. 39 - Subordinate Court Rules 1980, O. 8 r. 7(2).*

The respondent T had brought a civil action for negligence against the appellants as a result of an accident. After T's death , his son AR applied to be appointed as a party to the proceedings under O. 8 r. 7(2) of the Subordinate Court Rules 1980 (SCR). Although administration or probate had not as yet been granted pursuant to the Probate and Administration Act 1959 (the 1959 Act), the appellants consented to AR's application as a result of which a consent order was made in the Sessions Court.

However, the appellants later applied to set aside the consent order on the basis that AR was not a proper person to be made a party under O. 8 r. 7(2) and s. 6 of the Limitation Act 1953; the appellants' application was dismissed by the President of the Sessions Court and the High Court. Hence this appeal.

Held:

[1] When at any stage of any proceedings, a plaintiff dies intestate and his interests devolve or vest temporarily in the official administrator under s. 39 of the 1959 Act, then until administration or probate is granted, the Court has the discretion to order that his son or any other person be made a party under O. 8 r. 7(2) if the Court "thinks it necessary in order to ensure that all matters in dispute in the cause or matter may be completely determined and adjudicated upon".

[2] The Court agreed with the interpretation by the learned President Sessions Court as to the meaning of the SCR in particular rr. 7(2) and 9 in that the Rules are not concerned with the capacity of the person applying to be appointed as a party but that it merely gives the Court the power to appoint any person to proceed with a pending suit, for to interpret it otherwise would defeat the objective of r. 7(2) which is to avoid delay in the disposal of cases.

[Appeal dismissed.]

Cases referred to:
Parr v. Parr 2 LJ Ch 167
Tio Chee Hing v. Tractors Malaysia Bhd. [1973] 1 MLJ 66; [1975] 2 MLJ 1

Legislation referred to:
Limitation Act 1953, s. 6
Probate and Administration Act, s. 39
Public Authorities Protection Act 1948, s. 2
Subordinate Courts Rules 1980, O. 8 r. 7(2)

For the appellants - Mary Lim, SFC
For the respondent - Mahindar Singh; M/s. Mahindar & Co.

JUDGMENT

Mohd Azmi SCJ:

This was an appeal against the order of Lamin J dated 6 August 1990 in upholding the decision of the then President of the Sessions Court, Kuantan, whereby he had dismissed the appellants' application to set aside a consent order under O. 8 r. 7(2) of the Subordinate Courts Rules 1980.

The respondent, Taib bin Abdul Rahman was the plaintiff in Civil Suit No. 118 of 1981 in the Sessions Court. He claimed to have been knocked down on 11 September 1978 whilst lawfully walking along the road in Kuantan by a motor cycle owned by the Federal Government (1st appellant) and ridden by Mustafa bin Abdul Aziz (the 2nd appellant), who was a postman in the employment of the Postal Department. As such, he claimed damages for personal injuries sustained as a result of the negligence of the postman, both against the Federal Government as owner of the motor cycle and the motor cyclist.

It was common ground that in the course of the proceedings, the plaintiff died on 3 July 1984 and his son, Abdul Rahim bin Taib, applied by notice of application dated 22 January 1985 to be appointed a party to the proceedings under O. 8 r. 7(2) which provision was cited in full by the learned President in his judgment, the relevant part of which will be reproduced later. When the application came up for hearing, it would appear from the notes of proceedings of the Sessions Court that the appellants who at all material times were represented by Counsel, were satisfied firstly that the applicant had the necessary capacity to apply under O. 8 r. 7(2) and secondly that the application was necessary in order to ensure that all matters in dispute in the 1978 personal injury claim might be effectually and completely determined and adjudicated upon even though Abdul Rahim, the applicant had yet to be appointed as a personal representative of his father's estate under the Probate and Administration Act 1959 (Revised - 1972). Consequently, on 12 April 1985, the application of Abdul Rahim to be made a party was allowed by the learned President with the consent of both parties so that the proceedings could be carried on as if Abdul Rahim had been substituted as plaintiff for his deceased father. However, about three and a half months later, the appellants apparently had a second thought on the propriety of the consent order, and on 5 August 1985 they applied to have the consent order set aside on the ground that Abdul Rahim was "neither a capable nor proper person to be made a party to this suit ..., in that neither letters of administration nor probate have been granted to the said applicant so as to confer capacity within the meaning of O. 8 r. 7(2)"

We cannot help but observe that what must be paramount in the mind of the appellants can be discovered in para. 4 of the affidavit-in-support of their application to set aside dated 30 July 1985 to the effect that "the claim of the applicant on his own behalf is barred by

virtue of both s. 2(a) of the Public Authorities Protection Act 1948 (Revised - 1978) and s. 6 of the Limitation Act 1953 (Revised - 1981), the protection of which has clearly been waived by the appellants by the consent order. Having waived the defence of limitation through the consent order, we are of the view that this is the type of consent order which can only be set aside by fresh action - see *Tio Chee Hing v. Tractors Malaysia Bhd.* [1973] 1 MLJ 66; [1975] 2 MLJ 1. If this legal point had been canvassed before the appellate Judge, it would probably expedite the conclusion of the present dispute in favour of the respondent.

Be that as it may, the learned President, Encik Tee Ah Seng gave a reasoned judgment for making the order that he did. In the absence of a written judgment by Lamin J, we must assume that he agreed entirely with the reasons advanced for dismissing the appellants' application to set aside the consent order. We now reproduce the relevant part of the grounds of decision of the learned President:

The issue is whether the said order of 12 April 1985 was correct. Order 8 r. 7(2) reads as follows:

> 7(2) Where at any stage of the proceedings in any cause or matter the interest or liability of any party is assigned or transmitted to or devolves upon **some other person**, the Court may, if it thinks it necessary in order to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon, order that other person to be made a party to the cause or matter and the proceedings to be carried on as if he had been substituted for the first mentioned party.
> (Emphasis is mine)
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> In this rule the words "devolves upon some other person" are used. According to *Stroud's Judicial Dictionary* (4th Edn.,) "To 'devolve' means to pass from a person dying to a person living the etymology of the word shows its meaning" (per Leach, MR, *Parr v. Parr*, 2 LJ Ch. 167). In our case on the death of the plaintiff the interest of the deceased in the suit devolves upon the applicant.
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> I am of the opinion that the use of the word "person" shows that persons other than the personal representative can be appointed by the Court to continue a pending suit. If it is the intention of the legislature that only personal representatives can be appointed the draftsman would have used the words "personal representative" to avoid any ambiguity. The meaning of the word "person" becomes clearer when read with r. 9(1) of the Rules. Rule 9(1) reads as follows:
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> 9. (1) If after the death of a plaintiff or defendant in any action the cause of action survives, but no order under r. 7 is made substituting as plaintiff any person in whom the cause of action vests or, as the case may be, the personal representatives of the deceased defendant, the defendant or, as the case may be, those representatives may apply to the Court for an order that unless the action is proceeded with within such time as may be specified in the order the action shall be struck out as against the plaintiff or defendant, as the case may be who has died; but where it is the plaintiff who has died, the Court shall not make an order under this rule unless satisfied that due notice of the application has been given to the personal representatives (if any) of the deceased plaintiff and to any other interested persons who, in the opinion of the Court, shall be notified.
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> In r. 9(1) the words "but no order under r. 7 is made substituting as plaintiff **any person** in whom the cause of action vests" are used. And the use of the words "any person" underlined by me rather than the words "personal representative" as used in respect of a deceased defendant clearly shows that there is a distinction between the meaning of the words "person" and "personal representative". The meaning of the word "person" in this r. 9(1) means any person.

Further the later part of r. 9(1) provides that, "due notice of the application has been given to the personal representatives (if any) of the deceased plaintiff and to any other interested persons" This also supports my opinion that the word "person" in r. 7 mean a person who is not a personal representative can be appointed for the purpose of r. 7.

I am of the view that O. 8 r. 7(2) does not refer to personal representatives but refers to a person. I am of the opinion that this rule is not concerned with the capacity of a person. It merely gives the Court power to appoint any person to proceed with a pending suit when a party dies rather than leave the matter hanging until letters of administration or probate is granted.

I disagree with appellants contention that because s. 39 of the Probate and Administration Act which provides that all property of a person who dies intestate until administration is granted vests in the official administrator and as such the official administrator is the proper and capable person to apply.

We are equally in agreement with the reasons discussed by the learned President. We need only to add that although under s. 39 of the Probate and Administration Act, the interests of the deceased plaintiff vest in the official administrator (since he died intestate), it does not mean that pending an order for a grant of administration, only the official administrator could make an application to be made a party under O. 8 r. 7(2). In our opinion, such an interpretation would defeat the very object of r. 7(2) which is to avoid delay in the disposal of cases where the interests or liabilities of any party to a pending proceeding vest temporarily upon some other person, such as the official administrator. In our view the narrow interpretation advocated by the learned Counsel for the appellants has its root in the misinterpretation of the word "other person" in the latter part of r. 7(2) as referring to the words "some other person" in the earlier part of the provision.

In our opinion, in order to give effect to the principal object of the rule, which is to avoid delay in the disposal of cases, the word "that" immediately proceeding the word "other person" should be read merely as a relative or conjunctive adverb. In short, when the property or interest of an estate devolves or vests by virtue of s. 39 in some other persons - in this case the official administrator, "the Court may order that other person (that is, person other than the official administrator) to be made a party to the cause or matter". It seems clear that the word "that" should not be read as a demonstrative pronoun referring to the earlier mentioned "some other person" upon whom the interest or liability of a party devolves or vests but should be read as mere conjunction introducing the words "other person".

Thus, it is our conclusion that, when at any stage of any proceedings, the plaintiff dies intestate, and his interests devolves or vests temporarily in the official administrator under s. 39, until administration or probate is granted, the Court has the discretion to order that his son or any other person be made a party under O. 8 r. 7(2), if the Court "thinks it necessary in order to ensure that all matters in dispute in the cause or matter may be completely determined and adjudicated upon.

On the undisputed facts of the present appeal, the High Court was clearly correct in upholding the order of the Sessions Court.

We had accordingly dismissed the appeal but made no order as to costs.

Also found at [1991] 2 CLJ 1101